

From: maria torres [mailto:mujercoahuilteca@gmail.com]
Sent: Wednesday, January 07, 2015 1:31 PM
To: Gee, Randy <Gee.Randy@epa.gov>; jimmya@comanchenation.com; maria torres <mujercoahuilteca@gmail.com>
Subject: Re: TCEQ Public Meeting Notice 1/22/15 and Dateline to Summit Written Commentaries, Request A Contested Hearing, Interested Party Status Due Before January 22, 2015 and Kickapoo Indian Nation Legal Brief Objecting which Sites are Religious, Cultural, e...

Randy,
Jimmy

Enclosed please find information for TCEQ Public Meeting on 1/22/15 and Kickapoo Indian Nation Brief Objecting to TRC Determination of What Sites are Religious, Cultural or Historic Importance to the Tribe dated April 1, 2012. We are working on Letter. Please confirm/reply. We are highly Thankful for your help. Kawa

Coahuilteca Indian Tribe Nation
The Pacuache Clan of Texas
Mary Torres
Tribal Chairwoman
(210) 483-3879

**The Public Meeting will be held:
Thursday, January 22, 2015 at 7:00 PM
Middle Rio Grande Workforce Center
1200 Ferry Street
Eagle Pass, Texas 78852**

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for submitted public comments, the Executive Director will consider all timely comments and prepare a response to all relevant and material, or significant public comments. **Unless the application is directly referred for a contested case hearing, the response to comments will be mailed to everyone who submitted public comments and to those persons who are on the mailing list for this application.** If comments are received, the mailing list will also provide instructions for requesting a contested case hearing or reconsideration of the Executive Director's decision. A contested case hearing is a legal proceeding similar to a civil trial in a state district court.

TO REQUEST A CONTESTED CASE HEARING, YOU MUST INCLUDE THE FOLLOWING ITEMS IN YOUR REQUEST: your name; address; phone number; applicant's name and proposed permit number; the location and distance of your property/activities relative to the facility; a specific description of how you would be adversely affected by the facility in a way not common to the general public; and the statement "I/we request a contested case hearing." If the request for contested case hearing is filed on behalf of a group or association, the request must designate the group's representative for receiving future correspondence; identify an individual member of the group who would be adversely affected by the proposed facility or activity; provide the information discussed above regarding the affected member's location and distance from the facility or activity; explain how and why the member would be affected; and explain how the interests the group seeks to protect are relevant to the group's purpose.

Following the close of all applicable comment and request periods, the Executive Director will forward the application and any requests for reconsideration or for a contested case hearing to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

The Commission will only grant a contested case hearing on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission will only grant a hearing on issues that were raised in timely filed comments that were not subsequently withdrawn.

EXECUTIVE DIRECTOR ACTION. The Executive Director may issue final approval of the application unless a timely contested case hearing request or request for reconsideration is filed. If a timely hearing request or request for reconsideration is filed, the Executive Director will not issue final approval of the permit and will forward the application and request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

MAILING LIST. If you submit public comments, a request for a contested case hearing or a reconsideration of the Executive Director's decision, you will be added to the mailing list for this specific application to receive future public notices mailed by the Office of the Chief Clerk. In addition, you may request to be placed on (1) the permanent mailing list for a specific applicant name and permit number; and/or (2) the mailing list for a specific county. If you wish to be placed on the permanent and/or the county mailing list, clearly specify which list(s) and send your request to TCEQ Office of the Chief Clerk at the address below.

AGENCY CONTACTS AND INFORMATION. Citizens are encouraged to submit written comments anytime during the meeting or by mail before the meeting to the Office of the Chief Clerk, TCEQ, Mail Code MC-105, P.O. Box 13087, Austin, TX 78711-3087 or electronically at www.tceq.texas.gov.us/about/comments.html. If you need more information about this permit application or the permitting process, please call the TCEQ Public Education Program, Toll Free, at 1-800-687-4040. *Si desea información en Español, puede llamar 1-800-687-4040.* General information about the TCEQ can be found at our website at www.tceq.texas.gov. All written public comments must be received by the Office of the Chief Clerk at the noted address within 30 days from the date of newspaper publication of this notice or by the date of the public meeting, whichever is later.

Further information may also be obtained from Dos Republicas Coal Partnership at the address state above or by calling Mr. Leland Starks at (830) 421-5017.

Persons with disabilities who need special accommodations at the meeting should call the Office of the Chief Clerk at (512) 239-3300 or 1-800-RELAY-TX (TDD) at least one week prior to the meeting.

Issued: December 12, 2014



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
Protecting Texas by Reducing and Preventing Pollution

REVISED
NOTICE OF PUBLIC MEETING
AND
NOTICE OF APPLICATION AND PRELIMINARY DECISION
FOR WATER QUALITY TPDES PERMIT AMENDMENT WITH RENEWAL
FOR INDUSTRIAL WASTEWATER

PERMIT NO. WQ0003511000

APPLICATION AND PRELIMINARY DECISION. Dos Republicas Coal Partnership, 5150 North Loop 1604 West, San Antonio, Texas 78249, which operates the Eagle Pass Mine, a sub-bituminous coal mine, has applied to the Texas Commission on Environmental Quality (TCEQ) for a major amendment with renewal to Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0003511000 to add active mining acreage; add Outfalls 014M-020M to discharge stormwater and mine seepage from active mining areas; add Outfalls 001R, 003R, 004R, 006R-008R, and 014R-020R to discharge stormwater from post-mining areas; remove Outfalls 002, 005, and 009-013; allow for water in all ponds to be used for dust suppression; add Outfall 021 to discharge stormwater runoff from fueling areas, fuel storage areas, vehicle and equipment maintenance areas, truck washing stations, and coal handling and storage areas; and add Outfall 022M to discharge mine pit water from active mining areas and stormwater from inside the rail loop. The existing permit authorizes the discharge of mine seepage from active mining areas and stormwater at an intermittent and variable flow via Outfalls 001-013. The TCEQ received this application on September 5, 2013.

The facility is located on the northeast side of State Highway 1588, three miles northeast of the intersection of State Highway 1588 and U.S. Highway 277, and approximately five miles northeast of the City of Eagle Pass in Maverick County, Texas 77852. The effluent will be discharged via Outfalls 001M/R, 004M/R, 007M/R, 008M/R, 017M/R, 018M/R, 021, and 022M to unnamed tributaries, thence to Elm Creek, thence to Rio Grande Below Amistad Reservoir in Segment No. 2304 of the Rio Grande Basin; via Outfalls 003M/R, 006M/R, 014M/R, and 019M/R to unnamed ditches, thence to Elm Creek, thence to Rio Grande Below Amistad Reservoir in Segment No. 2304 of the Rio Grande Basin; via Outfalls 015M/R to an unnamed ditch, thence to an unnamed tributary, thence to Hediondo Creek, thence to Elm Creek, thence to Rio Grande Below Amistad Reservoir in Segment No. 2304 of the Rio Grande Basin; and via Outfalls 016M/R and 020M/R to Elm Creek, thence to Rio Grande Below Amistad Reservoir in Segment No. 2304 of the Rio Grande Basin. The designated uses for Segment No. 2304 are high aquatic life use, primary contact recreation, and public water supply.

In accordance with 30 Texas Administrative Code §307.5 and the TCEQ implementation procedures (June 2010) for the Texas Surface Water Quality Standards, an antidegradation review of the receiving waters was performed. A Tier 1 antidegradation review has preliminarily determined that existing water quality uses will not be impaired by this permit action. Numerical and narrative criteria to protect existing uses will be maintained. A Tier 2 review has preliminarily determined that no significant degradation of water quality is expected in Elm Creek, which has been identified as having high aquatic life use. Existing uses will be maintained and protected. The preliminary determination can be reexamined and may be modified if new information is received.

The TCEQ Executive Director has completed the technical review of the application and prepared a draft permit. The draft permit, if approved, would establish the conditions under which the facility must operate. The Executive Director has made a preliminary decision that this permit, if issued, meets all statutory and regulatory requirements. The permit application, Executive Director's preliminary decision, and draft permit are available for viewing and copying at the Maverick County Courthouse, 500 Quarry Street, Suite 2, Eagle Pass, Texas. This link to an electronic map of the site or facility's general location is provided as a public courtesy and not part of the application or notice. For the exact location, refer to the application. <http://www.tceq.texas.gov/assets/public/hb610/index.html?lat=28.818055&lng=-100.458611&zoom=13&type=r>

PUBLIC COMMENT/PUBLIC MEETING. You may submit public comments about this application. The TCEQ will hold a public meeting on this application because the Executive Director of the TCEQ has determined that there is a significant degree of public interest in the application. The purpose of the public meeting is to provide the opportunity to submit comments or to ask questions about the application.

The public meeting will consist of two parts, an Informal Discussion Period and a Formal Comment Period. A public meeting is not a contested case hearing under the Administrative Procedure Act. During the Informal Discussion Period, the public is encouraged to ask questions of the applicant and TCEQ staff concerning the application and the Executive Director's preliminary decision, but these informal comments made during the informal period will not be considered by the Commissioners before reaching a decision on the permit, and no formal response will be made. During the Formal Comment Period, members of the public may state their formal comments into the official record. A written response to all timely, relevant and material, or significant formal comments will be prepared by the Executive Director and considered by the Commissioners before they reach a decision on the permit. A copy of the response will be sent to each person who submits a formal comment or who requests to be on the mailing list for this application and provides a mailing address. Only relevant and material issues raised during the formal comment period can be considered if a contested case hearing is granted.

**RAILROAD COMMISSION OF TEXAS
OFFICE OF GENERAL COUNSEL
SURFACE MINING AND RECLAMATION SECTION**

**Dos Republicas Coal Partnership §
Permit No. 42A, Eagle Pass Mine §
Renewal/Revision/Expansion Application §**

Docket No. C5-0003-SC42-C

FILED
2012 APR - 1 AM 7:35
OFFICE OF GEN COUNSEL
RAILROAD COMMISSION
OF TEXAS

**KICKAPOO TRADITIONAL TRIBE OF TEXAS' BRIEF OBJECTING TO TRC
DETERMINATION OF WHAT SITES ARE OF RELIGIOUS, CULTURAL OR
HISTORIC IMPORTANCE TO THE TRIBE**

The Kickapoo Traditional Tribe of Texas file this its Kickapoo Traditional Tribe of Texas' Brief Objecting to TRC Determination of What Sites Are of Religious, Cultural or Historic Importance to the Tribe.

FILED
2012 APR - 2 AM 7:55
OFFICE OF GEN COUNSEL
RAILROAD COMMISSION
OF TEXAS

The purpose of this brief is to discuss whether the TRC has authority to determine matters related to Sections 125 and 151 of this permit application.

- I. **Governing Legislation.** Section 106 of the Historical Preservation Act of 1966 as amended through 1992 governs notice to and participation of Indian Tribes in the identifying, investigating, categorizing and handling of potentially significant archeological, culturally and historically sites.
 - a. **Consultation Requirement.** "Federal agencies also consult with official of federally recognized Indian tribes when the projects have the potential to affect historic properties on tribal lands or historic properties of significance to such tribes located off tribal lands." See Advisory Council on Historic Preservation publication entitled "Protecting Historic Properties: A Citizen's Guide to Section 106 Review" at p. 5. "Federal agencies must also consult with Indian tribes that attach religious and cultural significance to historic properties, regardless of their location." See Advisory Council on Historic Preservation publication entitled "Tribal Historic Preservation Officers", page 1, para. 5. The Tribal Preservation Officer of the Kickapoo Traditional Tribe of Texas has never been consulted.
 - b. **Sites Covered by Section 106.** "In the Section 106 process, a historic property is a prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places. This term includes artifacts, records, and remains that are related to and located within these

National Register properties. The term also includes properties of traditional religious and cultural importance to an Indian tribe..., so long as that property also meets the criteria for listing in the National Register.” See Advisory Council on Historic Preservation publication entitled “Protecting Historic Properties: A Citizen’s Guide to Section 106 Review” at p. 6.

- c. **EIS Made in Consultation with Tribe Required.** Under the National Environmental Policy Act (NEPA), “...a federal agency must determine if its proposed major actions will significantly impact the environment. Usually, if an agency is preparing an Environmental Impact Statement under NEPA, it must also complete a Section 106 review of the project.” Id. at p. 11. While an EIS was apparently prepared in this matter, the Kickapoo Traditional Tribe of Texas was never consulted.
- d. **Failure to Consult Results in Voiding of Actions.** “If the agency acts without properly completing Section 106 review, the ACHP can issue a finding that the agency has prevented meaningful review of the project. This means that, in the ACHP’s opinion, the agency has failed to comply with Section 106 and therefore has not met the requirements of federal law.” Id. at p. 20.
- e. **It is Mandatory that Tribe Shall be Consulted.** “Applicants for federal permits, licenses, and assistance are entitled to be Consulting Parties in the Section 106 consultation process. The other parties entitled to participate in consultation include the State and Tribal Historic Preservation Officers (SHPO/THPO), Indian tribes, and local governments. In addition, federal agencies may use the services of applicants to prepare information, analyses, and recommendations, but the federal agency remains legally responsible for all required findings and determinations. However, the ACHP advises federal agencies that applicants should not communicate directly with Indian tribes without prior consent from the tribes.” Advisory Council on Historic Preservation, publication entitled “Section 106 Consultation Between Federal Agencies and Indian Tribes Regarding Federal Permits, Licenses, and Assistance Questions and Answers at para. #1.
- f. **Consultation with Tribe is Not Delegable to State Agency.**
- g. **ACHP.** “The ACHP’s position is that a federal agency cannot delegate it government-to-government consultation with Indian tribes to applicants or other non-federal entities, including state and local governments, without prior consent from the tribes.” Id. at para. #2.

- i. "Indian tribes have a formal role as Consulting Parties in the Section 106 process. In the event that an Indian tribe concludes that they have been left out of discussions or their concerns have not been adequately addressed, ...tribes may notify the ACHP and request our participation in the consultation." Id. at para. #8.
- ii. Section 101(d)(6)(A) provides that: "Properties of traditional religious and cultural importance to an Indian tribe of Native Hawaiian Organization may be determined to be eligible for inclusion on the National Register."
- iii. "It is important to remember that Indian tribes are under no obligation to consult directly with an applicant [such as DRCP]. Absent a formal agreement or approved protocol previously negotiated between the federal agency and the Indian tribe, an agency must initiate and conduct the consultation process with the Indian tribe. Further, the ACHP regulations remind federal agencies that tribal consultation must recognize the government-to-government relationship, which often means appropriate Agency Officials when meeting with tribal representatives. " Advisory Council on Historic Preservation, publication entitled "Section 106 Consultation Between Federal Agencies and Indian Tribes Regarding Federal Permits, Licenses, and Assistance Questions and Answers at para. #2. Consultation has never taken place with the Kickapoo Traditional Tribe of Texas. And according to an intervention and subsequent motions to reconsider, consultation has not taken place with other Indian tribes who have an interest in the site. Judicial notice is requested of these filings. The determinations of what constitutes a property of religious and culturally significant site to an Indian tribe should be given great deference. A determination by THC would not be sufficient as it lacks knowledge of what is important to a tribe and it is unable to make such an assessment absent consultation, which did not take place in this instance. "When an Indian tribe informs a federal agency that a historic property of religious and cultural significance to the tribe may be affected by the undertaking, the federal agency must consider the 'special expertise' of the tribe in identifying this property. The ACHP advises federal agencies to refer any disputed eligibility determinations to the Keeper of the National Register of Historic Places for a formal determination of eligibility." Id. at para. #6.

- h. **Fish & Wildlife Service.** See also U.S. Fish & Wildlife Service publication entitled "Effectively Managing the Section 106 Consultation Process" at 20, which states "**Overall responsibility for complying with Section 106 cannot be delegated.** The Service is responsible for ensuring that the Section 106 process has been completed satisfactorily for agency undertakings. For large undertakings involving multiple Federal agencies, it is acceptable to designate a lead agency for complying with the National Historic Preservation Act."
- i. **Examples.** Examples of such prohibited delegation in this case would be between Office of Surface Mining to Texas Railroad Commission, Advisory Council on Historic Preservation to Texas Historic Commission, Environmental Protection Agency to both Texas Railroad Commission and Texas Commission on Environmental Quality, etc.

II. **No MOU in Place Authorizing TRC Action.** Memorandum of Understanding between THC and TRC has terminated. Attached hereto as Ex. 1, is a certified copy admitted as evidence in this case, of a Memorandum of Understanding and its transmittal letter. Judicial notice of this letter and MOU is requested. This MOU purports to have authority to change the federally enacted requirements of the Historical Preservation Act. In para.1 and 2, this attempt to change the applicable law is acknowledged by Curtis Tunnell, Executive Director of the Texas Historical Commission, who states: "[a]s Dr. Bruseth of my staff discussed with you in an earlier phone conversation, we will view the MOU as an interim document until federal and state regulations are changed. The changes will be to comply with the recent court decision involving the Office of Surface Mining and the need for surface mining activity to comply with Section 106 of the National Historic Preservation Act. *** According to Dr. Bruseth, it may take as long as two years for these regulations and rules to be changed. When the federal and state changes have been made or *no later than two years from the date of this letter, we understand that the MOU will be terminated and that Section 106 of the National Historic Preservation Act will be followed. The reason for the termination is that the MOU is substantially different than that required under Section 106.*" (emphasis added). Id.

- a. **Written Termination.** Separate from the argument of whether THC and TRC ever had authority to enter into an MOU which abrogates protections given to the Tribe by the U.S. Congress, the MOU and the transmittal letter by their terms prove that the MOU has been terminated and Section 106 governs.
 - i. **MOU Approved between Texas Agencies without Tribal Input.** MOU was signed between the THC and TRC on September 10, 1991. By its

terms, the "...Memorandum of Understanding will take effect when signed by both agencies and remain in effect until rescinded by formal action of either agency." See Exhibit "1", MOU at p. 5. No tribal input was sought or obtained.

- ii. **MOU Terminated within Two Years in 1993.** MOU was transmitted from THC to TRC on November 8, 1991. In the transmittal letter itself, written notice of termination occurred on November 8, 1991 and became effective on November 8, 1993. Therefore, any action on this permit purporting to act on the authority of this MOU is void as being done without proper authority. It is the Tribe's position that the permit itself and all subsequent actions regarding that permit are void due to TRC's lack of authority to act on Sections 125 and 151 of the application and the federal agencies involved failure to comply communication with the Indian Tribe's required by Section 106 of the National Historic Preservation Act of 1966 as amended through 1992.
- iii. **No New MOU.** Therefore, TRC is acting without authority in making any determinations re archeological, historic and culturally significant site regarding permits sections 125 and 151.

III. **Two Texas State Agencies Stripped a Federally Recognized Indian Tribe of Federally Given Rights Without Authority.**

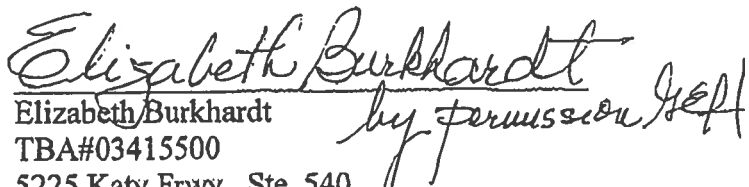
- a. KTTTs are federally recognized. See the previously filed brief in support of Kickapoo Traditional Tribe of Texas' request for party status in this matter, which is part of the file in this matter and to which a request for judicial notice is requested. The Kickapoo Traditional Tribe of Texas had conferred upon by it by virtue of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) and Public Law 97-429 the right on behalf of ...the Band and its members, to direct and control our own affairs, to protect and develop our land and resources for ourselves and our children, and to ensure the political integrity and cultural identity of the Band...." Constitution of the Kickapoo Traditional Tribe of Texas, Preamble and Certificate of Approval from the Department of Interior, Bureau of Indian Affairs.
- b. Department of Interior is the Kickapoo Traditional Tribe of Texas' trustee charged with protection of the tribe's rights under Section 106.
- c. Obligations to the Indian Tribes set out in Section 106 are not delegable. See discussion above.
- d. Tribe has not given consent to such delegation.

- IV. **Current Action Should be Abated and Prior Actions Voided Due to Failure to Comply with Section 106 and Failure to Join Necessary Parties.** Since the Kickapoo Traditional Tribe of Texas contends that THC was without authority to enter into the MOU, THC is a necessary party to this matter; and the permit application must be abated to allow joinder of THC as a necessary party. Additional necessary parties would be the other federal agencies involved with this permit, including Environmental Protection Agency, Office of Surface Mining, Advisory Council on Historic Preservation, Fish and Wildlife Service, Surface Transportation Board and other interested Indian tribes, including Coahuilteco Research Associates – C.R.A. Richard C. Garay – Los Mesquite Nation, Jesus J. Reyes, Jr. – Payaya and Los Mesquite Nations, Maria A. Torres, Paquache Nation. This matter may not proceed without the joinder of these necessary parties or written consent to proceed without them given by any affected Tribes, including the Kickapoo Traditional Tribe of Texas. Such tribe's assert that they have sites affected by the permit application which are both of archeological and cultural/historical interest; however, despite their presence in the area, their consent and consultation have never been sought.
- V. PRAYER. The Kickapoo Traditional Tribe of Texas prays that the TRC abate this matter to: (1) allow joinder of necessary parties; (2) allow required consultation with the Indian tribes as required by Section 106 of the National Historic Preservation Act; and (3) determination whether the TRC has authority to make determinations and findings of fact as to Sections 125 and 151 of the permit application.

RESPECTFULLY SUBMITTED,

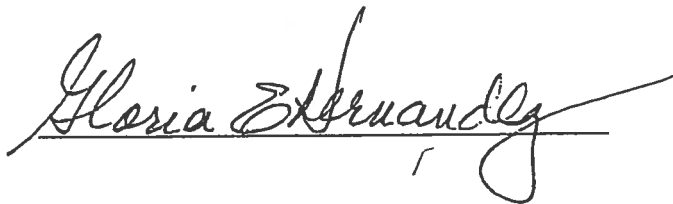
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CERTIFICATE OF SERVICE

A true and correct copy of the Kickapoo Traditional Tribe of Texas' Brief
Objecting To TRC Determination OF What Sites Are Of Religious, Cultural Or Historic
Importance To The Tribe was served on all parties of record on the 30th day of March 30, 2012.


Gloria Hernandez

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Dr. Carlos E. Hernandez and Board of Directors Maverick County Hospital District 3406 Bob Rogers Dr., Ste. 140 Eagle Pass, Texas 78852	Representing Maverick County Hospital District	Sent via: Regular Mail
Celeste P. Lira, Attorney Brin & Brin P.C. 6223 IH 10 West San Antonio, Texas 78201	Representing Maverick County Hospital District <u>clira@brinandbrin.com</u>	Sent via: Email

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